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SUPREME COURT, U.S.

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No. 06-577

In the Supreme Court of the United States

GARY SCHOR, PETITIONER

v.

ABBOTT LABORATORIES, RESPONDENT

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit properly held that a monopoly leveraging cause of action does not exist under section 2 of the Sherman Act where Abbott's only alleged anticompetitive act was raising the price of a patented product, and it is undisputed that Abbott has patents covering both of the plaintiff's alleged antitrust markets.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Respondent Abbott Laboratories informs the Court that it has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

This Court should deny Schor's Petition for one simple reason: the Seventh Circuit's resolution of this case does not conflict with any decisions of this Court or any decisions of other U.S. Courts of Appeals.

Schor argues that Supreme Court review is necessary to resolve a split of authority on the question of whether "monopoly leveraging" is a viable cause of action under section 2 of the Sherman Act. (Petition at 5). However, the Seventh Circuit did not affirm the district court based on a broad holding that no monopoly leveraging claim can exist under the Sherman Act. Rather, the Seventh Circuit refused to recognize Schor's monopoly leveraging claim based on the unique facts of this case. Specifically, the court emphasized that Abbott has multiple patents covering *both* of the plaintiff's alleged antitrust markets. The Seventh Circuit correctly held that Abbott cannot be liable for raising the price of one of its patented products (Norvir) in an alleged attempt to monopolize a second market (for Norvir-boosted protease inhibitors) over which Abbott *also* has patent rights.

Thus, while the Seventh Circuit acknowledged a split of authority between the Federal and the Ninth Circuits, it would be unnecessary and inappropriate for this Court to resolve that split in the context of this case. Under basic patent law and antitrust jurisprudence, no matter what jurisdiction's laws apply, Abbott cannot be liable under the unique facts presented.

A brief review of the lower court decisions reveals that they were highly fact-specific. The district court found that Schor could not prevail on his monopoly leveraging claim because Abbott's only alleged conduct was raising the price of its patented drug. *Schor v. Abbott Labs.*, 378 F. Supp. 2d 850 (N.D. Ill. 2005). In so holding, the court

recognized that there existed a conflict of law between the Ninth and the Federal Circuits regarding a patentee's scope of permissible conduct under the antitrust laws. The court concluded, however, that Abbott's patents distinguished this case from the relevant cases in both of the other circuits.

Likewise, the Seventh Circuit held that Abbott's pricing decisions did not give rise to a cognizable Sherman Act claim because Abbott acted well within its patent rights and its patents indisputably covered the market that Abbott was accused of attempting to monopolize. *Schor v. Abbott Labs.*, 457 F.3d 608 (7th Cir. 2006). In so holding, the Seventh Circuit followed well-established Supreme Court precedent and reached a result that is compatible with all existing Court of Appeals decisions to address the issue. As this Court explained more than forty years ago, a "patent empowers the owner to exact royalties as high as he can negotiate with the leverage of that monopoly." *Brulotte v. Thys Co.*, 379 U.S. 29, 33 (1964). This was not, for example, a case where Abbott conditioned the use of its patented product on some other, unpatented product. *Schor*, 457 F.3d at 614 (citing *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 457-58 (1940) and *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*, 243 U.S. 502, 512 (1917)). This was simply a case where a patentee acted within the scope of its patent rights by raising a product's price. Thus, Schor presented no actionable case under the Sherman Act.

As Schor notes, the Seventh Circuit *did* question the continued viability of the Ninth Circuit's opinion in *Image Technical Servs. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997) and the Second Circuit's opinion in *Berkey Photo v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1980). This analysis, however, was *dicta* that had no effect on the outcome of this case.

The Seventh Circuit's opinion does not contradict Second Circuit law because *Berkey* is no longer good law. As explained below, *Berkey* has been all but expressly overruled by this Court in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398, 415 n.4 (2004) and in *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993).

The Seventh Circuit's opinion also does not contradict Ninth Circuit law because of the critical factual differences between this case and *Kodak*. In *Kodak*, the Ninth Circuit held that it was possible for a patentee to be liable for using its patent monopoly in one market (for photocopier parts) to monopolize another, *unpatented* market (for photocopier servicing). In the view of the Ninth Circuit, a patentee could violate the antitrust laws if it exercised its patent rights with an intent to monopolize a second, unpatented market. Here, as the district court and the Seventh Circuit both acknowledged, Abbott has patents covering *both* of Schor's alleged antitrust markets: the market for Norvir and the so-called "boosted PI market" (for Norvir plus another protease inhibitor). Thus, even under *Kodak*, Schor's monopoly leveraging claim fails as a matter of law.

In the end, there is no need for this Court to review Petitioner's question in this case. It was neither the basis for the Seventh Circuit's holding nor will its answer have any effect on the resolution of this case. As such, Abbott respectfully requests that the Court deny Schor's Petition.

COUNTERSTATEMENT OF THE CASE

Schor's complaint concerns two of Abbott's patented AIDS drugs, Norvir® and Kaletra®. Both drugs are protease inhibitors ("PIs"), which are powerful medicines designed to stop the accumulation of HIV in the human blood stream. Norvir's active ingredient is called "ritonavir." Kaletra is Abbott's second-generation HIV drug that combines small doses of ritonavir with a separate PI called "lopinavir."

When it was launched in 1996, Norvir was priced and marketed as a standalone PI with a recommended daily dose of 1,200 milligrams. However, Abbott scientists discovered that Norvir had unique properties that made it extraordinarily valuable as a "booster" when taken in much smaller doses (100 to 200 milligrams daily). In these low doses, Norvir does not act as a PI. Instead, it slows the body's ability to break down a co-administered PI, thus "boosting" or enhancing the efficacy of the second PI.

As Norvir's clinical value in the treatment of HIV increased due to Abbott's discovery of its boosting capabilities, the volume of Norvir's sales dropped substantially because patients were taking it in much smaller doses. To account for Norvir's transition from a high-dose PI to a low-dose booster, Abbott raised the drug's wholesale price in December 2003. Abbott did not, at the same time, raise the price of Kaletra.

This pricing action was the sole basis for Schor's lawsuit. According to his complaint, Norvir's price increase violated section 2 of the Sherman Act, ran afoul of the Illinois Consumer Fraud Act's prohibition against "unfair" practices, and gave rise to a claim for unjust enrichment. To support his antitrust allegations, Schor loosely defined two markets: one for Norvir itself as a booster and another for PIs only when used in combination with Norvir as a booster. Schor alleged

that Abbott's decision to raise Norvir's price has "restrained competition" in the so-called "boosted PI market" by encouraging consumers to buy Kaletra (Abbott's boosted PI) instead of more expensive drug regimens that combine Norvir with a competing PI.

Although Schor claimed that Abbott had monopolized the so-called "boosted PI market," his complaint contained no facts supporting this bald allegation. He made no allegations concerning Kaletra's market share, either before or after the Norvir price increase. And, even though he claimed that the price increase was designed to increase Kaletra's sales, he did not allege that Kaletra's market share increased during the fifteen months between Norvir's price increase in December 2003 and the filing of his complaint in March 2005. On the contrary, Schor alleged that Kaletra's market share was decreasing before the price increase, and that Abbott faced stiff competition from at least seven PI competitors – Agenerase®, Crixivan®, Fortovase®, Invirase®, Lexiva®, Reyataz®, and Viracept®. Moreover, while Schor suggested that Norvir's price increase would force consumers to buy Kaletra, he contradicted himself by failing to allege that he personally was forced to buy Kaletra. Instead, despite the price increase, Schor continued to buy Norvir along with a competitor's PI.

Schor also admitted in his complaint that "Abbott created Norvir" and that Abbott has "various patents" giving it a government-sanctioned monopoly over Norvir. In fact, Abbott has approximately 56 patents relating to Norvir, which are part of the public record. Schor has not alleged, nor has any court found, that any of Abbott's patents are invalid or unenforceable. To the contrary, Schor acknowledged to the Seventh Circuit that he "is not challenging the legitimacy of the Norvir patents or the manner in which they were obtained." (Schor 7th Cir. Br. at 13).

Schor also never disputed that Abbott has numerous patents covering Norvir's use as a booster in combination with other PIs. Two of these patents – U.S. Patent No. 6,037,157 and U.S. Patent No. 5,886,036 – were attached as Exhibits C and D to Abbott's motion to dismiss. The '157 patent, for example, claims a "method for improving the pharmacokinetics" of PIs by administering a "therapeutically effective amount of a combination of said drug . . . and ritonavir," which is the active ingredient in Norvir. Based on its review of these exhibits, the district court found that Abbott has patents covering both of Schor's asserted antitrust markets. Schor did not challenge this finding on appeal to the Seventh Circuit.

District Court's Decision

Abbott moved to dismiss Schor's complaint, and the U.S. District Court for the Northern District of Illinois, Honorable Robert W. Gettleman, dismissed Schor's section 2 Sherman Act claim with prejudice. The court held, as a matter of law, that Abbott's price increase did not amount to an antitrust violation. The court then declined to exercise supplemental jurisdiction over Schor's state law claims, dismissing Counts II (Illinois Consumer Fraud Act) and III (unjust enrichment) without prejudice.

In addressing the merits of Schor's antitrust claim, the district court held that Abbott's re-pricing of Norvir did not violate the Sherman Act as a matter of law. The court acknowledged that the Federal Circuit and the Ninth Circuit had advanced conflicting views regarding a patentee's permissible scope of conduct. After analyzing this Court's precedent and the goals of federal patent and antitrust laws, the district court decided to follow the Federal Circuit's approach in *In re Independent Services Orgs. Antitrust Litig.*, 203 F.3d 1322 (Fed. Cir. 2000). The court concluded that "subject to narrow limitations, not at issue in the instant case,

a patentee's exercise of its statutorily-granted market power does not constitute a Sherman Act violation, even if such conduct affects a second market." *Schor v. Abbott Labs.*, 378 F. Supp. 2d 850, 858 (N.D. Ill. 2005). Thus, because it was undisputed that Abbott owns patents on Norvir, and that those patents give Abbott the right to set Norvir's price, Abbott's re-pricing of Norvir was not actionable even if it affected sales in the alleged "boosted PI market."

The district court went on to hold that, even if Ninth Circuit law applied, Abbott still would prevail as a matter of law because it has patents covering both of the plaintiff's alleged antitrust markets. The court acknowledged that under *Image Technical Services, Inc. v. Eastman Kodak, Co.*, 125 F.3d 1195 (9th 1997), "a patent holder may be liable under a monopoly leveraging theory for using its monopoly over a patented product to affect a secondary market." *Id.* at 857. The court concluded, however, that unlike the defendant in *Kodak*, Abbott had patents covering *both* of Schor's alleged antitrust markets – "Norvir's use in the stand-alone market as well as the boosted PI market." *Id.* at 859. In *Kodak*, the defendant allegedly used its patent monopoly over photocopier parts to monopolize an *unpatented* market for servicing photocopiers. But, here, Abbott allegedly used its patent monopoly over Norvir to monopolize a boosted PI market *over which it also had patent rights.* Thus, even if the court applied the monopoly leveraging theory articulated in *Kodak*, Abbott could not be liable as a matter of law. *Id.* at 860.

Seventh Circuit's Decision

The Seventh Circuit affirmed the district court's order dismissing Schor's complaint, holding that, as a matter of law, Abbott could not be liable under Schor's monopoly leveraging claim based on the facts in this case.

The Seventh Circuit first explained that this is an unusual case because Schor did not allege any recognized form of exclusionary practice: "Schor's complaint does not allege any of the normal exclusionary practices – tie-in sales (or another form of bundling), group boycotts, exclusive dealing and selective refusal to deal, or predatory pricing." *Schor v. Abbott Labs.*, 457 F.3d 608, 610 (7th Cir. 2006). As the court noted, "Abbott sells ritonavir as part of KALETRA, but this is not a tie-in because ritonavir is available separately as NORVIR." *Id.* In addition, "Abbott will sell to anyone willing to pay its price: there is no refusal to deal." *Id.* The court also dismissed the possibility that Schor was advancing a "price squeeze" theory articulated by Judge Learned Hand in *United States v. Aluminum Co. of America*, 148 F.2d 416, 436-38 (2d Cir. 1945). *Id.* at 610-11. Finally, Abbott had not engaged in predatory pricing because it made profits on Norvir and Kaletra and there was an absolute lack of "any prospect of rivals' exit" from the relevant markets. *Id.* at 611.

Against this backdrop, the Seventh Circuit methodically picked apart Schor's cause of action. First, the Seventh Circuit examined Abbott's conduct and concluded that, because of Abbott's patents, its pricing decisions did not amount to anticompetitive conduct that violated the Sherman Act. "The price of NORVIR cannot violate the Sherman Act: a patent holder is entitled to charge whatever the traffic will bear." *Id.* at 610. Moreover, the court found that there was nothing illegal about Abbott's pricing decision with respect to the ritonavir contained in Kaletra. *Id.* In fact, the court concluded that Abbott's conduct would have been legal even if Abbott had, in fact, monopolized the market for boosted PIs:

> [Abbott's] patents cover not only ritonavir administered by itself but also ritonavir administered in combination with another protease inhibitor. Abbott therefore could take

> control of the market in combination treatments until the patents expire. A patent does not permit its owner to condition use of the patented product on the surrender of a monopoly in some other unpatented product. But the product "ritonavir in combination with another protease inhibitor" *is* patented to Abbott, which therefore is entitled to monopolize the combination.

Id. at 614 (citations omitted). Therefore, because of Abbott's patents, the Seventh Circuit concluded that Abbott's pricing decisions with respect to Norvir and Kaletra were not actionable under the Sherman Act.

The Seventh Circuit went on to express considerable skepticism over the viability of "monopoly leveraging" as a theory of antitrust liability. The court explained that even if Abbott had a monopoly in the market for Norvir as a booster and wanted to exploit that monopoly, Abbott could not "make a monopoly profit for itself by keeping other drugs off the market." *Id.* at 611. As a matter of sheer economics, it made more sense for Abbott to *encourage* competition for the other drugs that rely on Norvir for its boost. Keeping other drugs off the market actually would *decrease* Abbott's profits on Norvir because there would be fewer drugs that relied on Norvir's boost and competed to lower each others' prices. "Abbott therefore has a powerful incentive to encourage competition among other producers rather than monopolize the market for all protease inhibitors." *Id.* at 614. "The basic point is that a firm that monopolizes some essential component of a treatment (or product or service) can extract the whole monopoly profit by charging a suitable price for the component alone." *Id.* at 612.

Although the Seventh Circuit was highly critical of Schor's monopoly leveraging theory, nowhere did the court

state that it was affirming the district court on the broad basis that monopoly leveraging does not exist as a viable theory of liability in antitrust cases. Rather, the court made clear that Abbott was immune from antitrust liability under the unique facts of this case because it owned patents covering both of the plaintiff's alleged antitrust markets. This Petition followed.

REASONS FOR DENYING THE PETITION

Schor's Petition should be denied because the Seventh Circuit's disposition in this case does not conflict with any decisions of this Court or any of the other U.S. Courts of Appeals. The Seventh Circuit *did* note the existence of a circuit split between the Federal and Ninth Circuits on the issue of whether a patentee could violate the Sherman Act through a legitimate exercise of its patent rights if it affects a second market. But there is no need to resolve that split here because Abbott indisputably has patents covering *both* relevant markets. That fact means that Schor's cause of action would not survive under any Circuit's standard.

Significantly, and contrary to Schor's argument, the Seventh Circuit did not affirm the district court's dismissal on the broad holding that no monopoly leveraging claim can exist under the Sherman Act. Instead, the Seventh Circuit's decision was based on the unique facts of this case, where (i) Abbott's only action was raising the price of its patented drug, and (ii) Abbott's undisputed patents fully covered the entirety of Schor's alleged antitrust markets. Because of the undisputed scope of Abbott's patents, which covered both of the antitrust markets alleged in Schor's complaint, the Seventh Circuit's holding essentially amounts to an affirmation of the well-established and long-standing rule that a patentee may act permissibly within the scope its patent rights without violating the Sherman Act.

I. The Seventh Circuit's Holding Rests On Well-Established Legal Principles And Requires No Further Review From This Court.

First, contrary to Schor's arguments in his Petition, the Seventh Circuit's holding did not rest on whether a monopoly leveraging theory is cognizable under the Sherman Act. Although the court opined on that issue, the Seventh Circuit's disposition of this case was actually based on this Court's long-standing patent-antitrust jurisprudence. The court held that Abbott's conduct could not give rise to a cognizable claim for monopoly leveraging under the Sherman Act because Abbott acted within its patent rights and did not extend its patent monopoly beyond the limits of what Congress intended to give in the patent laws. *Schor v. Abbott Labs.*, 457 F.3d 608 (7th Cir. 2006).

No matter what Circuit's law applies, there is no question that Abbott's action in raising the price of its patented product was lawful. As this Court explained more than forty years ago, a "patent empowers the owner to exact royalties as high as he can negotiate with the leverage of that monopoly." *Brulotte v. Thys Co.*, 379 U.S. 29, 33 (1964). "Patents are not given as favors ... but are meant to encourage invention by rewarding the inventor with the right, limited to a term of years fixed by the patent, to exclude others from the use of his invention." *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964). Because of the patentee's right to exclude, even if Abbott had raised Norvir's price an infinite amount (i.e., refused to sell to anyone), the antitrust laws "do not negate the patentee's right to exclude others from patent property." *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1362 (Fed. Cir. 1999); *see also In re Brand Name Prescription Drugs Antitrust Litigation*, 186 F.3d 781 (7th Cir. 1999).

Schor does not dispute this, nor did he cite any cases in the Seventh Circuit or in his Petition that hold otherwise. Indeed, no such cases exist. The very purpose of a patent is to give the patentee pricing power through the exclusionary right of a government-sanctioned monopoly. *Zenith Laboratories, Inc. v. Carter-Wallace Inc.*, 530 F.2d 508, 513 n.9 (3d Cir. 1976). "The owner of a patented article can, of course, charge such price as he may choose...." *Monsanto Co. v. McFarling*, 302 F.3d 1291, 1299 (Fed. Cir. 2002). A "patentee is privileged to withhold [its invention] from sale at any price, or to offer it for sale at any price he wishes, however low or high." *Zenith Laboratories*, 530 F.2d at 513 n.9; *accord Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 252 (D.C. Cir. 1987) ("[A]n excessive price alone does not establish a violation of the antitrust laws, because imposition of a high price is not, in and of itself, an anticompetitive act."); *Carter-Wallace, Inc. v. United States*, 449 F.2d 1374, 1383 (Ct. Cl. 1971) ("absent any overriding unlawful conduct, patentees can charge for their patented products and licenses whatever the market will bear"); *Coffman v. Federal Laboratories, Inc.*, 171 F.2d 94, 101 (3d Cir. 1949) (explaining that a patent owner "may set his own price for permissive use").

Thus, in the end, the Seventh Circuit properly concluded that Abbott's pricing action "cannot violate the Sherman Act: a patent holder is entitled to charge whatever the traffic will bear." *Schor*, 457 F.3d at 610. This conclusion was based on years of straightforward patent jurisprudence that clearly establishes that a patent holder is entitled to charge whatever price it chooses for its patented product, free from liability under the antitrust laws.

II. To The Extent That A Circuit Conflict Exists On The Question Of Monopoly Leveraging, That Conflict Is Not Implicated In This Case.

Schor argues that the Seventh Circuit's opinion reaches broader conclusions about the continued viability of "monopoly leveraging" as a theory of antitrust liability, which conflicts with *Berkey Photo v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1980) and *Image Technical Servs. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997). The Seventh Circuit's discussion of this issue, however, was *dicta* that should not and need not be reviewed by this Court. Having concluded that Abbott's actions were protected by its patents, the Seventh Circuit's economic discussion of monopoly leveraging was not necessary to the resolution of the case and did not affect its outcome.

A. The Second Circuit's Monopoly Leveraging Opinion Is No Longer Good Law.

Even if the Seventh Circuit's opinion could be construed as an express rejection of the Second Circuit's opinion in *Berkey*, this rejection hardly creates a conflict. This is because *Berkey* is no longer good law. Since its announcement more than twenty-five years ago, *Berkey* has been denounced by this Court and rejected by numerous circuits, including the Ninth Circuit (which Schor incorrectly asserts is in agreement with the Second Circuit).

Indeed, *Berkey* was all but expressly overruled by this Court in *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko*, LLP, 540 U.S. 398, 415 n.4 (2004) and *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993). In *Berkey*, the Second Circuit held that it is possible to allege a monopoly leveraging theory where a company merely gains a "competitive advantage" in the second market, even if there is no attempt to monopolize that market. In

Trinko, however, this Court rejected the Second Circuit's monopoly leveraging theory and reemphasized its holding in *Spectrum* that all section 2 Sherman Act claims – including monopoly leveraging claims – must be supported by proof of actual monopolization or at least a "dangerous probability of success" in monopolizing the second market. *Trinko*, 540 U.S. at 415 n.4.

In *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 547 (9th Cir. 1991), the Ninth Circuit also expressly rejected *Berkey*'s monopoly leveraging theory. "We now reject *Berkey*'s monopoly leveraging doctrine as an independent theory of liability under Section 2." *Id.* at 548-49. The Ninth Circuit explained that "the elements of the established actions for 'monopolization' and 'attempted monopolization' are vital to differentiate between efficient and natural monopolies on the one hand, and unlawful monopolies on the other. *Berkey Photo*'s monopoly leveraging doctrine fails to differentiate properly among monopolies." *Id.* In so holding, the Ninth Circuit concluded that there is no free-standing cause of action for monopoly leveraging, absent an attempted monopolization or actual monopolization.

Accordingly, this Court should not grant Schor's Petition in order to resolve a perceived conflict between the Seventh and Federal Circuits, on the one hand, and the Second Circuit, on the other. *Berkey* – the Second Circuit's monopoly leveraging case – is no longer good law.

B. The Ninth Circuit's Monopoly Leveraging Opinion Is Easily Distinguished From The Case At Bar Because The Patentee Attempted To Take Over A Market That Its Patents Did Not Cover.

The Seventh Circuit's opinion also does not conflict with the Ninth Circuit's opinion in *Image Technical Servs. v.*

Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1997) because the facts of the two cases are dramatically different.

In *Kodak*, the Ninth Circuit held that it was possible for a patentee to be liable for using its patent monopoly in one market (for photocopier parts) to monopolize another, *unpatented* market (for photocopier servicing). *Kodak*, 125 F.3d at 1215-16. The Ninth Circuit was concerned that the defendant in that case was "attempt[ing] to extend a lawful monopoly beyond the grant of a patent." *Id.* at 1217.

Here, in contrast, Abbott is accused of using its patent monopoly in one market (Norvir) to attempt to monopolize another, *patented* market (Norvir's use as a booster with other PIs). There is no dispute that Abbott has numerous patents covering *both* markets. As the district court found, unlike the defendant in *Kodak*, Abbott's "Norvir patents apply in both markets to cover Norvir's use in conjunction with drugs manufactured and sold by third parties." *Schor*, 378 F. Supp. 2d at 860. The Seventh Circuit similarly concluded that "[Abbott's] patents cover not only ritonavir administered by itself but also ritonavir administered in combination with another protease inhibitor. Abbott therefore could take control of the market in combination treatments until the patents expire." *Schor*, 457 F.3d at 614.

By reaching this conclusion, the Seventh Circuit was merely reiterating the long-established principle that the antitrust laws are implicated only when a patent holder extends its monopoly power "beyond the limits of what Congress intended to give in the patent laws." *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990). Here, where Abbott has patents covering both of the relevant markets, it is clear that its decision to raise Norvir's price falls squarely within "the limits of what Congress intended to give [Abbott] in the patent laws." *Id.*

Thus, Abbott cannot possibly be liable under the Sherman Act.

This Court, therefore, should deny Schor's Petition. This case is factually distinct from *Kodak* such that, even under Ninth Circuit law, Abbott must prevail. Abbott is not accused of using its legitimate patent monopoly to monopolize a second, unpatented market. It is accused of using its legitimate patent monopoly over Norvir to attempt to monopolize a second market for Norvir-boosted protease inhibitors that *also is patented by Abbott*. Because Abbott has the absolute legal right to exclude competition in *both* of Schor's alleged antitrust markets, it cannot be liable under the Sherman Act under any possible theory of liability, and this case therefore does not present a suitable vehicle for resolving any conflict on the issue of monopoly leveraging.

CONCLUSION

In the end, Schor's arguments in favor of certiorari are wholly insubstantial. By asking this Court to reexamine the Seventh Circuit's opinion, Schor essentially is asking this Court to grant certiorari to address an issue – i.e., the general viability of monopoly leveraging as a theory of antitrust liability – that is not essential to the proper disposition of this case. The Seventh Circuit affirmed the dismissal of Schor's complaint based on the long-standing right of a patentee to set the price of its patented product. That decision was manifestly correct and does not conflict with any other federal authority. Accordingly, this Court should deny Schor's Petition.

Respectfully submitted,

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